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FEDERAL COMMUNICATIONS COMMISSION  
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March 27, 1998

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M St., N.W.  
Washington, D.C. 20554

**Re: Computer III Further Remand Proceedings: Bell  
Operating Company Provision of Enhanced Services;  
1998 Biennial Regulatory Review – Review of  
Computer III and ONA Safeguards and Requirements;  
CC Docket Nos. 95-20 and 98-10**

Dear Ms. Salas:

On behalf of LCI International Telecom Corp. ("LCI"), I am enclosing for filing an original and eleven copies of LCI's Comments on the Further Notice of Proposed Rulemaking issued on January 30, 1998 in the proceedings listed above. I am also providing an exact copy of these comments on a diskette in WordPerfect 5.1 format to Janice Myles of the Common Carrier Bureau. Please call me if you have any questions.

Respectfully submitted,

*David Sieradzki*

David L. Sieradzki  
Counsel for LCI International Telecom  
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Enclosures

cc: Attached service list

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MAR 27 1998

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
<i>Computer III</i> Further Remand Proceedings:	)	CC Docket No. 95-20
Bell Operating Company	)	
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review --	)	CC Docket No. 98-10
Review of <i>Computer III</i> and ONA	)	
Safeguards and Requirements	)	

COMMENTS OF LCI INTERNATIONAL TELECOM CORP.

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Dated: March 27, 1998

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**I. COMPETITORS SHOULD HAVE THE SAME ACCESS TO THE MONOPOLY LOCAL NETWORK AS THE INCUMBENT LOCAL EXCHANGE CARRIERS' OWN RETAIL OPERATIONS HAVE.**

While the decades-long history of this proceeding and its predecessors is complex and sometimes arcane, its goal remains important: to promote competition in information services (or enhanced services) by ensuring that competitive information service providers ("ISPs") have the same access to the functions of the existing monopoly local exchange telephone network as the incumbent local exchange carriers' ("ILECs") own retail ISP operations have. In this regard, the goal of this proceeding is closely akin to the goals of a number of more recent proceedings implementing the Telecommunications Act of 1996 ("1996 Act"), all of which seek to promote competition in local, long distance, and other markets by preventing ILECs from leveraging their control over their ubiquitous local exchange networks into retail markets, and ensuring that competitors have reasonable and nondiscriminatory access to those facilities.

The Commission, in *Computer III*, abandoned its previous policy of protecting information service competition by requiring the Bell Operating Companies ("BOCs") to offer basic telecommunications and information services through structurally separate corporate entities. <sup>2/</sup> Instead, the Commission substituted much weaker (yet more complex) safeguards known as "open network

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<sup>2/</sup> See Notice, ¶ 1 n.1, for a complete cite to the *Computer III* proceeding.

architecture" ("ONA"). Various aspects of the Commission's decision to abandon structural separation have been rejected on several occasions by reviewing courts. 3/

In the 1996 Act, Congress expressed a clear policy preference favoring the use of structural separation and nondiscrimination requirements to prevent ILECs from abusing their market power over the local telephone network *vis á vis* their competitors in the long distance, 4/ information service, 5/ and equipment manufacturing markets. 6/ In particular, the 1996 Act requires BOCs to offer *interLATA* information services through a separate affiliate. 7/

The *Notice* in this proceeding, despite the clear Congressional preference for structural separation, generally proposes to continue the *Computer III* nonstructural regime for *intraLATA* information services while implementing a *structural* approach for *interLATA* information services. The Commission should not adopt this irrational and inefficient policy proposal.

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3/ See, e.g., *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"); *California v. FCC*, 39 F.3d 919 (9th Cir.), *cert. denied*, 115 S.Ct. 1427 (1995) ("*California III*").

4/ 47 U.S.C. §§ 271 and 272.

5/ 47 U.S.C. § 260, 272, 274, and 275.

6/ 47 U.S.C. § 275.

7/ 47 U.S.C. § 272(a)(2)(C).

First, the proposal rests on an apparent faith in local exchange competition as a panacea, and fails to consider the fact that Section 251(c)(3) network element provisions have yet to be fully implemented by ILECs, much less to be shown effective in eliminating the ILECs' power to use their networks in an anticompetitive way *vis-à-vis* their ISP competitors. Second, the *Notice* fails to take into account the fact that Section 272 requires the BOCs to offer interLATA information services through a separate affiliate, and consequently greatly understates the benefits and overstates the costs of a properly designed system of structural separation.

LCI also encourages the Commission to consider the structural and other safeguard issues in this case in light of the broader debate about the value of structural approaches in reducing the ability and incentive of ILECs to discriminate and engage in anticompetitive activity. In particular, the Commission should consider the relationship between the structural safeguards needed to ensure information service competition and the structural model proposed in LCI's "Fast Track" proposal for the establishment of separate ILEC affiliates -- a "NetCo" monopoly network operator and a "ServeCo" retail competitor --- as an alternate means of satisfying the Section 271 requirements for BOC interLATA entry. 8/

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8/ Petition of LCI International Telecom Corp. for Expedited Declaratory Rulings: A "Fast Track" Plan to Expedite Residential Local Competition And Section 271 Entry Through Establishment Of Independent RBOC Wholesale and

[Footnote continued]

Such a system has the potential to create incentives for pro-competitive ILEC behavior in the information service marketplace, just as it could in the local telecommunications arena.

We discuss these issues in greater detail below.

## **II. THE COMMISSION MUST REVISIT THE ANALYSIS IN THE *NOTICE TO BETTER UNDERSTAND THE REAL-WORLD DYNAMICS OF COMPETITION AND STRUCTURAL SEPARATION*.**

To lay the groundwork for vigorous information services competition, the Commission will need to understand how current competitive safeguards are working, and undertake an accurate economic analysis of the policy options it faces. The analysis in the *Notice* fails to conduct such an assessment, and as a result its tentative policy conclusions are skewed. LCI strongly urges the Commission to re-examine these conclusions in light of the factors discussed below.

### **A. Section 251 Unbundling, As Implemented To Date, Does Not Alleviate The Ninth Circuit's Concerns About Discrimination In Providing Network Access.**

In *California III*, the Ninth Circuit concluded that "the FCC's cost benefit analysis is flawed and . . . [is] set aside . . . [as] arbitrary and capricious," because it "failed to provide support or explanation for some of its material

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[Footnote continued]

Retail Service Companies, CC Docket No. 98-5 (filed Jan. 22, 1998) ("LCI Fast Track Petition").

conclusions regarding prevention of access discrimination.” 9/ In particular, the court found that:

[T]he BOCs have the incentive to discriminate and the ability to exploit their monopoly control over the local networks to frustrate regulators’ attempts to prevent anticompetitive behavior. The FCC has not explained adequately how its diluted version of ONA will prevent this behavior. 10/

In response, the *Notice* takes the position that the existence of Section 251 of the 1996 Act, and the FCC’s unbundling of network elements pursuant to that law, may “alleviate the Ninth Circuit’s underlying concern[;]” 11/ it states,

We tentatively conclude that the de-regulatory, pro-competitive provisions of the 1996 Act, and the framework the 1996 Act set up for promoting local competition, are consistent with, and provide additional support for, the continued application of the Commission’s current nonstructural safeguards regime for BOC provision of intraLATA information services. 12/

This tentative conclusion relies on a blithe assumption that the policy objectives of Section 251 and the Commission’s regulations thereunder are being fully realized. But to reach such a result would require ignoring the mountains of evidence before the Commission that Section 251 is not yet working and that local

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9/ *California III*, 39 F.3d at 930.

10/ *Id.* 39 F.3d at 929.

11/ *Notice*, ¶ 29; see ¶¶ 29-34, 49-51.

12/ *Id.*, ¶ 51.



competition is far from becoming a reality. It should hardly be necessary to remind the Commission that:

- The Commission has rejected four Section 271 applications, and not a single BOC in a single state has qualified for interLATA entry.
- Not a single ILEC has yet developed Operational Support Systems ("OSS") that fully comply with the Commission's rules -- even though the Commission has held that OSS are critical and indispensable for the provision of UNEs. 13/
- The ILECs have largely refused to offer UNEs in the combined manner in which many prospective CLECs seek to purchase them.
- The Commission has recognized, in appealing the Eighth Circuit's decision striking down key rules implementing the 1996 Act, that,

to the detriment of consumers, the court of appeals' interpretation of the 1996 Act will subject aspiring new entrants to delay, uncertainty, and burdensome litigation on the basic methodological issues that the Commission sought to address well over a year ago. . . . Because the Eighth Circuit has stayed and vacated the Commission's rules interpreting the Act's core substantive provisions, would-be competitors remain uncertain about the scope of their basic rights under the statute. That pervasive uncertainty is a principal reason why local exchange monopolists still receive approximately 98% of the \$100 billion in annual revenues generated by the provision of exchange access and local exchange services. 14/

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13/ *Application by BellSouth Corp. Pursuant to Section 271 To Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231, FCC 98-17, ¶ 20 (released February 4, 1998); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 518 (1996).

14/ *FCC v. Iowa Utilities Board*, No. 97-831, FCC & DOJ Petition for a Writ of Certiorari (U.S. Supreme Court, filed Nov. 1997), at 24.

The Commission cannot reasonably rely on the effects of Section 251 unbundling and other pro-competitive provisions of the 1996 Act that have not yet been realized, as a basis for the Commission's continued departure from its pre-existing structural separation policy. To do so would fly in the face of the Ninth Circuit remand and would arbitrarily and capriciously ignore reality.

**B. The *Notice* Understates The Benefits And Overstates The Costs Of Structural Separation.**

The *Notice* both overstates the costs of structural separation -- particularly in light of the structural separation that is mandated by Section 272 and other provisions of the statute -- and understates the benefits. First, it must be emphasized that Section 272 of the Act mandates, at a minimum, that the BOCs implement structural separation for *interLATA* information services. The marginal costs of including intraLATA information services in this structural scheme are minimal. Accordingly, the only BOC services to which the *Notice* can possibly propose not to apply structural safeguards are *intraLATA* information services. The *Notice* also fails to consider the costs and the practical difficulty, or even impossibility in a great number of cases, of separating the interLATA and intraLATA aspects of information services. It also fails to consider that BOCs will also be creating other separate affiliates, pursuant to Sections 272, 274, and 275.

Second, the *Notice*, in a seeming time warp, reiterates the same list of costs and benefits of structural separation that were described in the orders whose cost/benefit analysis the Ninth Circuit rejected. <sup>15/</sup> The Ninth Circuit, as well as the passage of time, require the Commission to reassess this analysis. Moreover, the Commission must weigh seriously the Congressional decision that the costs of structural separation for information services outweighed the benefits, when it enacted Section 272. The Commission must marshal substantial evidence to outweigh this Congressional assessment of the need for structural, as opposed to nonstructural, safeguards.

The Commission's proposed analysis also apparently assumes that the only form of structural separation that could be considered is the form used in *Computer I* and *Computer II*, which mandated separate corporate entities for basic telecommunications services and for enhanced/information services. Alternative models are available that would reduce the costs and increase the benefits.

For example, Section 272 requires, at a minimum, structural separation between an RBOC's intraLATA and interLATA telecommunications

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<sup>15/</sup> *Notice*, ¶¶ 46-47 & n.136; see also ¶¶ 56-59 & nn.158, 164. The *Notice* cites as costs of structural separation the discouragement of innovation and introduction of new information services, the costs of duplicative facilities and personnel, limitations on joint marketing, deprivation of economies of scope, and transitional disruptions in moving from the existing integrated approach to a structurally separated regime. See *id.*

services, and between its ILEC telecommunications operations and its interLATA information services. Under this model, in certain circumstances, the RBOC's Section 272 affiliate might be able to offer interLATA telecommunications and both intraLATA and interLATA information services on an integrated basis. This would substantially reduce the costs of structural separation, permitting the Section 272 affiliate to enjoy the efficiencies of joint marketing and other economies of scope in offering both telecommunications and information services. The nondiscrimination requirements of Section 272 are generally stronger than the protections in the *Computer III*/ONA regime, and would help ensure that unaffiliated companies are able to develop innovative new information services that use the BOC network. This, in turn, would spur innovation and introduction of new services by the BOC's Section 272 affiliate.

LCI submits that the form of structural separation described in the LCI Fast Track Petition would be even more beneficial, and indeed is the optimal approach for promoting competition. The benefits of this voluntary approach, described in detail below, are far greater than those of the ONA non-structural safeguards model.

### **III. THE *COMPUTER III* REMAND MUST BE CONSIDERED IN TANDEM WITH THE LCI "FAST TRACK" PROPOSAL AND RELATED POLICY INITIATIVES.**

The Commission should consider in a coordinated fashion the various pending matters involving the use of separate corporate entities, combined with

strict nondiscrimination safeguards, to promote competition in markets for services that are, to various extents, dependent on the ILECs' monopoly local network infrastructure. In particular, the *Notice* raises issues that are closely akin to, and should be considered in the context of, two major petitions that LCI has filed recently: the LCI/CompTel petition for rulemaking regarding OSS for local competition, 16/ and the LCI "Fast Track" petition for expedited declaratory rulings regarding RBOC structural separation, residential local competition, and expedited Section 271 entry. 17/

The *Notice* already recognizes the relationship between the performance standards and monitoring criteria at issue in the LCI/CompTel OSS Petition and some of the existing standards and criteria in the ONA regime. 18/ The *Notice* does not recognize, however, that the OSS problems identified in the LCI/CompTel OSS Petition, and the need for performance standards to address them, are evidence that the Commission's reliance on Section 251 network elements as a basis for reducing protections in this area is misplaced.

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16/ Petition for Expedited Rulemaking by LCI International Telecom Corp. and the Competitive Telecommunications Association, RM 9101 (filed May 30, 1997) ("LCI/CompTel OSS Petition").

17/ LCI Fast Track Petition.

18/ *Notice*, ¶¶ 107, 114.

The Commission also should take account of the issues raised in the LCI Fast Track Petition when considering what action to take in this proceeding. In that Petition, LCI describes the BOCs' inherent incentives to stymie local telecommunications competition, because the BOCs function both as the provider of essential network inputs to their competitors while also competing with those same companies on the retail side. The LCI Fast Track Petition proposes a voluntary structural approach that a BOC could elect to pursue, in exchange for faster interLATA entry. That approach is designed to substantially reduce the BOCs' incentives to thwart local competition and to incent them to provide what their competitors need to succeed, while speeding interLATA entry and deregulating the BOCs' retail activities. <sup>19/</sup> The Commission should consider the value of structural approaches such as LCI's proposal in evaluating the need for structural separation in this case.

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<sup>19/</sup> Under this model, a BOC's competitive retail operations would be located in an affiliate ("ServeCo") that would be structurally separated from the operator of the existing monopoly local network ("NetCo"). Both entities would be subject to structural requirements that ensure that they operate completely independently on a truly arms' length basis (e.g., no shared facilities, functions, services, employees, or brand names; substantial public ownership of ServeCo; independent directors; and ServeCo management compensation based exclusively on ServeCo's performance). ServeCo would obtain network services from NetCo on precisely the same basis as its competitors, and most retail regulation of ServeCo would be eliminated. This structure would give NetCo an incentive to sell network services in the manner that its customers -- both to its affiliate and independent competitors -- demand.

## CONCLUSION

In sum, LCI urges the Commission: (1) to analyze the *Computer III* remand issues realistically, taking into account the deficiencies, to date, in the implementation of the 1996 Act; (2) to consider the costs and benefits of a nonstructural approach for *intraLATA* information services in light of the Congressional determination that structural separation is preferable to nonstructural approach for *interLATA* services; (3) to weigh in the cost-benefit analysis the fact that the BOCs will need to establish such separate subsidiaries anyway under Section 272 for their *interLATA* information services; and (4) to consider these issues in tandem with the Commission's consideration of the structural approach proposed in the LCI "Fast Track" Petition.

Respectfully submitted,

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Dated: March 27, 1998

**CERTIFICATE OF SERVICE**

I, Rebecca G. Wahl, hereby certify that on this 27th day of March, 1998, a copy of the Comments of LCI International Telecom Corp., was hand delivered to the parties listed below.



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